hearing on the merits convened on April 14, 1999, it was discovered that SWBT had not produced certain documents in discovery.[7] On April 15, 1999, SWBT produced a redacted document labeled "Southwestern Bell DSL Methods and Procedures," which appeared to be responsive to numerous requests for information timely served on SWBT by ACI and Covad during the discovery period prior to the convening of the hearing on the merits.[8] This document was subsequently marked and admitted as ACI Exhibit 17. The Arbitrators immediately ordered SWBT to produce previous versions of "Southwestern Bell DSL Methods and Procedures" (M&Ps), a key manual on xDSL methods and procedures.[9]

On April 16, 1999, SWBT provided an unredacted version of ACI Exhibit 17 that was designated as confidential; this exhibit was admitted into evidence under seal as ACI Exhibit 17a. On April 20, 1999, and April 23, 1999, ACI and Covad, respectively, filed motions for sanctions against SWBT for discovery abuse, based on the belated discovery of ACI Exhibits 17 and 17a. Because of the belated production of highly relevant documents[10] and the consequent concern that SWBT had not been fully responsive to discovery requests, the Arbitrators ordered that discovery be extended for a period of six weeks to allow Petitioners an opportunity to conduct additional discovery. A hearing on the motions for sanctions convened on June 2, 1999,

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[7] During the hearing on the merits, in response to a Commission staff question, SWBT witness Allan Samson testified that SWBT had created internal documents. Tr. at 324-325 (April 14, 1999). Counsel for SWBT, Mr. Leahy, conceded that the documents would have been responsive to various Requests for Information (RFIs) filed by the Petitioners. Tr. at 620-621 (April 15, 1999).

[8] For example, the xDSL M&P document, subsequently admitted as ACI Exhibit 17, was responsive to at least the following Requests for Information (RFIs) served by ACI and on SWBT: ACI's Second Request for Information (RFI), Numbers 1, 2, 3, 15, 19, 20, 25, 31, 33, 36, 38, 39, 40, 53, 69, and 71; ACI's Third RFI, Nos. 6, 7, 15, 16, 28; ACI's Sixth RFI Nos. 1, 2, 3; ACI's Eighth RFI, No. 3; 's First RFI, Nos. 11, 12, 14, 15, 16, and 28; 's Second (RFI), Nos. 42, 49, 50, 51, 53, 54, 55, and 58. The above RFIs were propounded prior to April 14, 1999.

[9] Tr. at 642 (April 15, 1999) states: "We want Southwestern Bell to produce the 10/5/98 version of this document, as well as any other versions and supporting documentation that you can provide to us that would support or be relevant to or would provide source documentation for this xDSL methods and procedures document that you provided. That's by nine o' clock in the morning. We would also like for you to provide a list of those that have been directly involved with this project, not to make them available but just provide a list of those who have been involved in this project, and I would also like an answer to the question to what – or for what purpose has this document been used. In other words, has it been used in any offices for the conduct of any business, and I want you to interpret that as broadly as possible."

[10] The same day (April 16, 1999) that SWBT produced ACI Exhibit 17a, SWBT also produced approximately two dozen additional relevant documents retrieved from employees pursuant to the Arbitrators' directive.

and continued until June 6, 1999. The sanctions hearing was reconvened and concluded on June 23, 1999.[11]

ACI filed an amended motion for sanctions, which Covad joined on June 2, 1999. ACI's amended motion asserted that SWBT intentionally committed a sanctionable act[12] and therefore additional support for sanctions exists. In support of its claim, ACI attached a copy of what appeared to be an e-mail message from an attorney for SBC Communications, Inc. (SBC) to another SBC employee, which had been created during SWBT's initial period of discovery, and had been produced by SWBT during the period of additional discovery.[13] After hearing extensive argument, closely reviewing the argument made in ACI's Amended Motion for Sanctions, and reviewing the briefs and support filed by the parties, the Arbitrators determined that the e-mail message was not privileged and it was admitted into evidence under confidential seal as ACI Exhibit 153.[14] SWBT immediately made an oral motion for reconsideration. The Arbitrators denied this motion on the three grounds discussed in Section II. B. of this Order. On June 16, 1999, SWBT filed its written Motion for Reconsider of the Arbitrators' bench ruling admitting the e-mail message into the record.

On June 2, 1999, the Arbitrators called six witnesses[15] to testify on matters contained in ACI Exhibit 153.[16] After placing the witnesses under "the rule,"[17] Commission staff questioned each witness, Petitioners were given an opportunity to cross-examine them, and SWBT was allowed to engage in redirect examination of those witnesses.

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[11] The hearing on the sanctions was convened prior to the continuation of the hearing of the merits and was recessed and reconvened from time to time concurrently with the hearing on the merits.

[12] *See* Confidential Attachment C, Paragraph 1.

[13] Southwestern Bell Telephone Co. (SWBT) is a subsidiary of SBC Communications, Inc.

[14] Tr. at 948-957 (June 3, 1999).

[15] The six SWBT witnesses called were Sharon Collier, Jerry Gordon, William Deere, Bruce Nesbit, Mari Quick, and Merrie Cavanaugh. Ms. Cavanaugh, although placed under the rule, was ultimately not called to testify.

[16] Tr. at 166-167 (June 2, 1999).

[17] TEX. R. CIV. PROC. 267 provides for witnesses on both sides in a civil proceeding to be sworn and removed out of the courtroom to some place where they cannot hear the testimony as delivered by any other witness. The witnesses in this proceeding were also instructed not to discuss the case with each other or with any other person in the case other than the attorneys in the case, except by permission of the court. This is termed placing the witnesses under the rule. *See also* TEX. R. CIV. EVID. 614, *Exclusion of Witnesses.*

Prior to questioning of these witnesses, SWBT requested that it be allowed to use a document, asserted to be confidential under the attorney-client privilege, to explain ACI Exhibit 153. At the same time, however, SWBT wanted the Arbitrators to find, in advance, that disclosure of the document to the Arbitrators would not constitute a waiver of any privilege asserted for the document, or of any other communications on the same subject matter.[18] The Arbitrators refused to grant this request, and asked the parties to file briefs on the issue. The briefs were filed prior to reconvening the hearing on sanctions on June 23, 1999.[19] After taking oral argument on this issue in the reconvened hearing on sanctions, the Arbitrators ruled that SWBT could not use an allegedly privileged document to prove or disprove facts contained in ACI Exhibit 153 and then maintain that the document, along with all other evidence necessary to make ACI Exhibit 153 fully understood or to explain the same, are privileged and not subject to discovery by ACI and Covad or the Arbitrators.[20] As a result, SWBT did not use the document in question during the sanctions hearing.

### C. JURISDICTION AND GOVERNING RULES

The underlying § 251 interconnection arbitration proceeding is conducted pursuant to the authority granted to the Commission by the federal Telecommunications Act.[21] P.U.C. PROC. R. 22.305(j) states that the Texas Rules of Civil Procedure do not apply as a matter of law in FTA arbitration proceedings, unless specifically referenced in Subchapter P.[22] Order No. 1 in this

[18] Tr. at 885-888 (June 3, 1999); this matter is fully addressed below at section II. C.

[19] SWBT's Response to Briefing Requested by Arbitrators on Waiver of Attorney Client Privilege (June 16, 1999), ACI's Brief on Attorney Client Privilege (June 16, 1999), Covad's Brief on Attorney Client Privilege (June 16, 1999).

[20] Tr. at 949-950 (June 3, 1999). *See* TEX. R. CIV. EVID. 107.

[21] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified as amended in scattered sections of 15 and 47 U.S.C.) (FTA).

[22] P.U.C. PROC. R. 22.305(j) states "The rules of privilege and exemption recognized by Texas law shall apply to arbitration proceedings under this subchapter. The Texas Rules of Civil Procedure, Texas Rules of Civil Evidence, and Subchapters A-O of this chapter are not applicable to proceedings under this subchapter, unless specifically referenced in this subchapter."

proceeding incorporates this rule by stating that the Texas rules will not apply unless specifically referenced.[23]

P.U.C. PROC. R. 22.305(k) (Subchapter P) specifically grants the Arbitrators broad discretion in conducting proceedings consistent with the powers given the presiding officer under P.U.C. PROC. R. 22.202(c). This rule generally grants the presiding officer broad discretion in conducting the course, conduct and scope of a hearing. The Arbitrators conclude that P.U.C. PROC. R. 22.202(c) *allows* the Arbitrators to conduct this proceeding in accordance with the Texas Rules of Civil Procedure, together with the Commission's procedural rules on discovery and sanctions.[24]

Specifically, TEX. R. CIV. PROC. 215(3) authorizes an adjudicative body to impose sanctions for discovery abuse.[25] P.U.C. PROC. R. 22.161 also provides for sanctions in contested cases and closely tracks TEX. R. CIV. PROC. 215. Under the Arbitrators' broad authority granted by P.U.C. PROC. R. 22.305(k), where there is conflict between the two rules, the Arbitrators use TEX. R. CIV. PROC. 215 in addition to, or in lieu of, P.U.C. PROC. R. 22.161. It is also noted that TEX. R. CIV. PROC. 215 is similar to Federal Rule of Civil Procedure 37, which also authorizes discovery sanctions.

The Arbitrators note that this sanctions proceeding is one of first impression. The question may arise as to whether federal law on privilege issues applies to the resolution of this proceeding. Thus, the Arbitrators cite applicable federal legal authority in addition to state legal authority on such issues, specifically the attorney-client privilege.

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[23] Order No. 1, Notice of Prehearing Conference, Notice of Hearing, and Establishing Procedures (January 8, 1999).

[24] Subchapter H, Discovery Procedures, P.U.C. PROC. R. 22.141, 22.142, 22.143, 22.144, 22.145, and Subchapter I., Sanctions, P.U.C. PROC. R. 22.161.

[25] *Bodnow v City of Hondo*, 721 S.W.2d 839, 840 (Tex. 1986).

# II. RULINGS ON MOTIONS

## A. MOTIONS TO DECLASSIFY ACI EXHIBIT 153

### Factual Summary

Petitioners made oral motions during the hearing on sanctions for declassification of ACI Exhibit 153 and a number of other documents.[26] The Arbitrators requested that parties negotiate to resolve which documents could be declassified, but no consensus was reached. Petitioners then filed motions to declassify,[27] which were limited in scope to only documents in evidence by Order No. 18.[28] SWBT responds that it has properly designated these documents as "confidential information" under the Protective Order. In support, SWBT filed affidavits for a number of documents in evidence that it has designated as "confidential," for *in camera* review.

It is worth noting that the issue of declassification appears at several points within this Order. The Petitioners have filed motions to declassify, and have also claimed that improper designation of documents as confidential is a violation of the Protective Order, and should be considered a sanctionable offense. The Arbitrators will not rule on the motion to declassify the vast majority of documents at this time, but will instead only rule with respect to ACI Exhibit 153. The Arbitrators address whether the alleged improper designation of documents as confidential rises to the level of sanctionable behavior in Section II. D. of this Order.

### Conclusion

The Arbitrators have not had the opportunity to complete a page-by-page review of the two boxes of documents at issue. In the interest of filing this Order in a timely fashion, the Arbitrators will reserve ruling on the remaining documents in question until a later date.

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[26] Tr. at 968 (June 3, 1999).

[27] ACI's Second Motion to Declassify (June 25, 1999), Motion of Communications Company to Declassify Documents Improperly Designated Confidential by SWBT (June 25, 1999).

[28] Order No. 18, Addressing Southwestern Bell Telephone Company's Request for Extension of Time and Clarifying Responses to Motions to Declassify (July 2, 1999).

As stated in Order No. 19, the proceedings before this Commission are open and held in the public interest. Primarily for that reason, the presumption is that all documents in this proceeding are public and not entitled to be veiled in secrecy. There is no basis under applicable law or the previous orders in this proceeding to find that ACI Exhibit 153 contains confidential information. The Arbitrators do not find, nor has SWBT asserted, that ACI Exhibit 153 contains trade secret information or confidential business information. The Arbitrators further note that SWBT has not provided any support for designating ACI Exhibit 153 as confidential.[29] In keeping with the rulings in Order No. 8, the Arbitrators do not find that the information contained in ACI Exhibit 153 is competitively sensitive information. Furthermore, the Arbitrators uphold their ruling that ACI Exhibit 153 is not a privileged communication. At this time, all of ACI Exhibit 153 is declassified. However, this ruling is stayed, pending a ruling on appeal by the Commissioners on this Order. For the purposes of maintaining the confidentiality of ACI Exhibit 153, all references to the substance of the document are contained in Confidential Attachment C, which has been filed under seal, pending the Commission's final ruling.

## B. Motion To Reconsider And Reverse Bench Ruling On The Status Of ACI Exhibit 153

### Factual Summary

ACI Exhibit 153 is an e-mail message from Mari Quick, dated January 14, 1999, to a group of SWBT and SBC employees.[30] In their bench ruling issued on June 3, 1999, the Arbitrators heard full argument and ruled on three, separate, independent grounds that the ACI Exhibit 153 was not privileged, or that SWBT had waived the privilege. First, the Arbitrators ruled that the e-mail was not a privileged communication in that SWBT failed to meet its burden of proof to provide a factual basis for the privilege. Second, in the alternative, in the event the e-mail was privileged, the Arbitrators found that SWBT had intentionally waived the privilege when it produced the document. Third, in the alternative, even if the document were privileged,

[29] In its response to Petitioners' motions to declassify, SWBT did not provide an affidavit to support its designation of "Confidential" on ACI Exhibit 153.

[30] *See* Confidential Attachment C, Paragraph 2.

the Arbitrators found that the Petitioners made a *prima facie* showing that the communication met the crime/fraud exception under TEX. R. CIV. EVID. 503(d)(1).[31]

During the hearing on sanctions, SWBT immediately made an oral motion for reconsideration of the Arbitrators' ruling. The Arbitrators denied this motion on the same three grounds. In its written Motion to Reconsider, SWBT again asks that the Arbitrators reverse this bench ruling. At a minimum, SWBT seeks the reversal of the crime/fraud finding. It appears that SWBT may acquiesce to a finding that the document is not subject to the attorney-client privilege (the first ground), or that the privilege on ACI Exhibit 153 was waived on grounds other than the crime/fraud exception.

## Analysis

### *Ground One: The Communication Is Not Subject to the Attorney-Client Privilege*

SWBT offered no factual support for its claim of attorney-client privilege with respect to ACI Exhibit 153. To prove the attorney-client privilege, the burden is upon the party asserting the privilege to present evidence necessary to establish the privilege. The evidence may be testimony presented at a hearing or through affidavits. TEX. R. CIV. PROC. 193.4(a). The claimant must establish the following elements: (1) the asserted holder of the privilege is a client; (2) the person to whom the communication was made is an attorney and is acting as such in connection with the communication; (3) the communication relates to a fact of which the attorney was informed by the client without the presence of strangers for the purpose of securing primarily either an opinion on law, legal services, or assistance in some legal proceeding, and not for the purpose of committing a crime or tort; and (4) the privilege has been claimed and not waived by a court. TEX. R. CIV. EVID. 503; *United States v. Robinson*, 121 F.3d 971, 974 (5th Cir., 1997) cert. denied; *United States v Kelly,* 569 F.2d 928, 938 (5th Cir. 1978) cert denied.

The e-mail message is not a communication between client and attorney. Rather, it is a business communication containing an instruction from one SBC employee to other SBC

[31] Tr. at 948-956 (June 3, 1999).

employees. The issue, therefore, concerns what Ms. Quick communicated to 81 SBC employees in her e-mail message.[32]

The communication in Ms. Quick's e-mail of January 14, 1999 is not privileged because it does not convey legal advice; instead, the communication contains a directive regarding business matters of an administrative nature.[33]

There is no legal context, and no reference to legal rights and obligations, attributed to the statements contained in the e-mail that would demonstrate it contained legal opinions or advice. An author's belief that the communication was an "attorney/client communication" does not necessarily make it so. All communications with lawyers are not *ipso facto* privileged; rather, the privilege applies only when legal advice is sought from a professional legal advisor in his capacity as such. 8 John H. Wigmore, Evidence § 2292 at 554. The record is devoid of any evidence establishing that Ms. Quick sought legal advice or conveyed legal advice. Again, on its face, the communication does not refer to any *legal* reason underlying the directive. It is merely an instruction to do something, asserted without any rationale for doing so.

If conclusory statements were sufficient to establish the attorney-client privilege, almost any such document involving an attorney would be protected from disclosure. *See Interphase Corp. v. Rockwell International Corp. et al.*, 1998 WL 664969 (N.D. Tex. 1998). A material fact cannot be cloaked in secrecy merely by claiming it was communicated by an attorney. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996).

In *Upjohn*, the court rejected a mechanistic approach to application of the attorney-client privilege and held that each case must be evaluated to determine whether the application of the privilege would further the underlying purpose of the privilege. *Upjohn Co. et al. v. United States et al.*, 449 U.S. 383, 396, 397; 101 S.Ct. 677 (1981). The purpose of the privilege is to "encourage frank and full communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Id.* at 389. Unlike instances in which a communication is clearly one between an attorney and client

[32] *See* Confidential Attachment C, Paragraph 3.

[33] *See* Confidential Attachment C, Paragraph 4.

concerning legal issues. Ms. Quick's e-mail message does not have any implied relation to a legal proceeding or legal issue.

Furthermore, the communication is not privileged simply because it was sent to an attorney. *Upjohn at* 395 - 396.[34]

Other than *Interphase,* there are no cases on point in the Fifth Circuit that address the distinction between legal advice and business advice. Other federal courts, however, have addressed this issue. In the Eighth Circuit, the court looked at the subject matter of the communication and the context in which the communication was made in order to limit privileged communications to a particular *legal problem*, while taking into account a corporation's way of doing business (italics added). *See Diversified Industries. Inc. v. Meredith,* 572 F.2d 596 (8th Cir. 1978).

Based on Ms. Quick's testimony, the Arbitrators find that the e-mail message was a matter of routine business. The federal courts addressed routine business communications in *Hercules v. Exxon Corp.,* which held that a communication is not privileged if made in the routine course of business without a request for legal advice.[35]

The court in *Burton v. RJ Reynolds Tobacco Co.,* stressed that the communication must relate to legal advice and be made for the purpose of giving or receiving legal advice. To this end, the court held that evidence must be proffered that the document claimed to be privileged involved the giving or requesting of legal advice.[36] Failure to introduce evidence that the client communicated information in confidence in order to seek legal advice will cause a claim of privilege to fail. *United States v. Abrahams.* 905 F.2d. 1276, 1283 (9th Cir. 1990) overruled on other grounds.

There is no evidence that anyone sought legal advice from Ms. Cavanaugh on the matters contained in the e-mail message. Moreover, there is no evidence that the e-mail message was made for the purpose of conveying an opinion of law, or legal services or assistance in a legal proceeding. The record reflects that Ms. Quick conveyed routine business matters, not legal

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[34] *See* Confidential Attachment C, Paragraph 5.

[35] 434 F. Supp. 136, 145 (D. Del 1997).

[36] 177 F.R.D. 491, 496 - 497 (D. Kan. 1997).

advice as defined by federal legal authority. In conclusion. SWBT failed to prove the communication was legal advice or that it facilitated the rendition or professional legal services.

***Ground Two: Intentional Waiver***

The Arbitrators ruled from the bench that SWBT had intentionally waived any attorney-client privilege associated with the e-mail communication when it produced ACI Exhibit 153. There are four reasons why the Arbitrators' ruling on that matter was correct. First, testimony shows that an attorney, in accordance with the Protective Order, reviewed every SWBT document that was designated "confidential information."[37] Second. every privileged document produced was assigned either a Bates stamp number beginning with ACICRECP or ACICP.[38] Third, the production of the e-mail message was not inadvertent – it was not wedged in the middle of another document, for example – but was instead intentionally provided through SWBT's production process. Finally, in anticipation of production, the e-mail message was stamped "confidential" – *not privileged* -- by a SWBT attorney. The document was *not* included in SWBT's log of privileged communications, although SWBT unsuccessfully attempted to add it to the privilege log through an addendum filed on June 9, 1999. In view of the review of the document by SWBT's attorneys, its subsequent designation as a confidential -- and not privileged -- document, and its production as such to other parties, the Arbitrators properly concluded in their bench ruling that SWBT waived any privilege associated with the e-mail message.

The Arbitrators also find authority under federal common law that the production by SWBT waived the privilege, if any exists, under the *Alldread* test. The Fifth Circuit, in *Alldread v. City of Grenada et. al.*, 988 F.2d 1425 (5th Cir. 1993) no writ. adopted a five-part test for determining whether waiver has occurred when a privileged document is claimed to be inadvertently produced. The court held that the circumstances surrounding a claimed inadvertent disclosure should be evaluated on a case-by-case basis to determine if protection is warranted. 988 F.2d at 1434. In determining whether inadvertent disclosure has resulted in a waiver of

[37] Tr. at 1041 (June 3. 1999). Testimony cites that an attorney reviewed every piece of confidential production and the Protective Order required that an attorney review each and every document. *See* Confidential Attachment C, Paragraph 6.

[38] Tr. at 1476 (June 3. 1999).

privilege, the court held that all of the circumstances surrounding the disclosure should be evaluated, taking into consideration (1) the reasonableness of the precautions taken to prevent disclosure; (2) the amount of time taken to remedy the error; (3) the scope of discovery; (4) the extent of disclosure; and (5) the overriding issue of fairness. 988 F.2d at 1434; *see also, Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 50 (M.D.N.C. 1987) no writ.

This test balances the purpose of the attorney-client privilege – protecting communications which the client intended to be confidential – but yet does not reward "those claiming the privilege of the consequences of their carelessness if the circumstances surrounding the disclosure do not clearly demonstrate that continued protection is warranted." *Alldread* at 1434. *Alldread* predates the adoption of TEX. R. CIV. PROC. 193.3,[39] which was adopted to reflect current federal common law and to overturn *Granada Corp. v. 1st Ct. of Appeals*, 844 S.W.2d 223, 227 (Tex. 1992), which was overruled on other grounds. Absent any express test under TEX. R. CIV. PROC. 193.3 as to its analysis and application, the Arbitrators find the Fifth Circuit test controlling.

When a document has been voluntarily disclosed but inadvertent disclosure is claimed, the proponent of attorney-client privilege has the burden of first proving that the disclosure was inadvertent, and then persuading the court that the privilege has not been waived. *Parkway Gallery* at 50; *See Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323 (N.D.Cal. 1985). The record reflects that SWBT established that it took reasonable steps to protect numerous documents upon which it claimed privilege, as evidenced in its voluminous privilege log.[40] Further, SWBT requested the return of ACI Exhibit 153 – the only document claimed as inadvertently disclosed – after it was proffered. However, these are the only factors conceivably in SWBT's favor. In fact, the elaborate document production procedure can equally support the

[39] TEX. R. CIV. PROC. 193.3(d) states that a party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of Evidence if-- within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made-- the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.

[40] *See* Confidential Attachment C, Paragraph 6.

conclusion that the attorney-client privilege was voluntarily waived. The scope of discoverable material was limited to such an extent in this particular instance that SWBT could reasonably have discovered any privileged materials and designated them as such. The Arbitrators had instructed SWBT on more than one occasion that it could request that the scope of discovery be narrowed. The record reflects that SWBT did not request an extension for discovery. In addition, full disclosure occurred when Petitioners became fully aware of the contents of the directive. Once disclosure is complete, an order "cannot restore confidentiality and, at best, can only attempt to restrain further erosion . . . only in special cases should [an order] attempt to resurrect the secret by. . . limiting further disclosure." *Parkway Gallery* at 52. SWBT's disclosure in this instance is not a special case; in the interest of fairness, the substance of ACI Exhibit 153 relates to matters central to the discovery disputes in this proceeding, which are the core of this sanctions proceeding. For all these reasons, the Arbitrators find that production of the e-mail document was intentional, and, therefore, SWBT waived any privilege associated with the communication upon its production.

***Ground Three: The Crime/Fraud Exception***

In the alternative, the Arbitrators ruled that the e-mail message is not privileged because it falls within the crime/fraud exception to the attorney-client privilege. TEX. R. CIV. PROC. 503(d)(1). This exception applies only if the party seeking the information makes a *prima facie* case of contemplated fraud, the document is related to the *prima facie* proof, and the *prima facie* case is not rebutted in the record. *Granada* at 227. A *prima facie* showing is made by setting forth evidence that, if believed by the jury would establish that the client was about to commit or was engaging in ongoing fraud. *Volcanic Gardens Management Co., Inc.. v. Paxson*, 847 S.W.2d 343, 347 (Tex.App.—El Paso 1993) no writ. However, mere allegations of such will not suffice and there must be a relationship between the communication to the alleged crime or fraud. *In re International Systems & Controls Corp.*, 693 F.2d 1235, 1243 (5th Cir. 1982).

SWBT argues that the Supreme Court in *United States v. Zolin* required an extrinsic showing of *prima facie* evidence before the Arbitrators could even consider what ACI Exhibit

153 said on its face.[41] SWBT's reliance on *Zolin* is misplaced. The Court in *Zolin* held just the opposite: the exception does not always have to be established by independent evidence. 491 U.S. at 556. Indeed, the facts here are remarkably similar to the facts in *Zolin*. As in *Zolin*, the e-mail message in ACI Exhibit 153 is the sole evidence establishing the alleged crime or fraud. To prohibit Petitioners from making their *prima facie* case using this document would lead to an absurd result. Further, under *Zolin*, once the Arbitrators looked at the e-mail message to determine if it was privileged, they were then also permitted to ascertain if the exception applied. *Id.* at 568.

Ms. Quick's e-mail communication was dated January 14, 1999, well after this litigation had begun, and after the first set of RFIs had been propounded to SWBT. SWBT did not offer any rebuttal evidence.[42]

The law embraces the open discovery of facts so that fact-finding bodies can ascertain the truth. When a communication shows that a client was about to commit or was engaging in ongoing fraud, the crime fraud exception necessarily applies to negate any assertion of the attorney-client privilege. This exception is well established. Because of the *prima facie* showing for which SWBT did not present rebuttal evidence, the Arbitrators confirm their bench ruling that the crime/fraud exception applies and, therefore, ACI Exhibit 153 is not privileged.

**Conclusion**

The Arbitrators find that SWBT has not advanced any new arguments justifying reversal. The motion is yet another reiteration of the arguments SWBT made during the hearing on sanctions. There is no new additional evidence from SWBT that rebuts the finding. The Arbitrators overrule the motion, finding again that SWBT did not establish that ACI Exhibit 153 is a privileged document, or, if the document was privileged, that SWBT waived the privilege when it intentionally produced the document, or that the document is not privileged because, on its face, it squarely fits the crime fraud exception under TEX. R. CIV. EVID. 501(d)(1), and there is no evidence in the record that rebuts the *prima facie* showing.

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[41] *United States v Zolin*, 491 U.S. 554; 109 S.Ct. 2619 (1989).

[42] *See* Confidential Attachment C, Paragraphs 7 and 8.

## C. SWBT'S REQUEST FOR USE OF PRIVILEGED DOCUMENTS UNDER TEX. R. CIV. EVID. 107

### Factual Summary

When ACI Exhibit 153 was proffered, SWBT argued that the rule of optional completeness (TEX. R. CIV. EVID. 107) allowed SWBT to use a privileged document in an effort to explain the circumstances around what the directive in ACI Exhibit 153 said on its face.[43] SWBT contended the extrinsic, privileged evidence would show additional exculpatory facts not apparent from a plain reading of ACI Exhibit 153.[44] The Petitioners argued that if SWBT intended to use a privileged document, it followed that SWBT must waive the privilege on that document and all similar communications.[45] SWBT, however, wanted the Arbitrators to rule beforehand that SWBT would not be required to waive the privilege on the exculpatory document, or any other related privileged communication. The Arbitrators were concerned that allowing a single document, protected under the cloak of attorney-client privilege, to be reviewed for the sole purpose of providing an exculpatory explanation, but not entered into evidence, would severely prejudice the Petitioners and prevent the Arbitrators from discovering all of the facts surrounding the misconduct indicated on the face of ACI Exhibit 153.

In fact, TEX. R. CIV. EVID. 107 cuts against SWBT's arguments by providing that the entire context of the document, rather than selective portions, should be reviewed. The Arbitrators refused SWBT's request at the time, but because of the seriousness of the allegations, the Arbitrators requested briefs on the issue of the scope of waiver and whether TEX. R. CIV. EVID. 107 extended to the use of privileged documents. Briefs were submitted and the parties reiterated their positions.

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[43] TEX. R. CIV. EVID. 107 states "When a part of an act, declaration, conversation, writing or recorded statement is given in evidence by one party, the whole on the same subject may be inquired into by the other, and any other act, declaration, writing or recorded statement which is necessary to make it fully understood or to explain the same may also be given in evidence, as when a letter is read, all letters on the same subject between the parties may be given. "Writing or recorded statement" includes depositions."

[44] Tr. at 885 – 888 (June 3, 1999).

[45] Tr. at 893 – 898 (June 3, 1999).

SWBT proffered the affidavit of Merrie Cavanaugh in support of SWBT's contention that ACI Exhibit 153 was privileged.[46] The Cavanaugh affidavit, however, went beyond an attempt to prove privilege.[47] In effect, SWBT was circumventing the Arbitrators' ruling against allowing extrinsic evidence, that SWBT claimed was privileged, to be used in the hearing. Upon inquiry by the Arbitrators, SWBT said that it would assert the attorney-client privilege on any of the communications discussed in the affidavit. Further, SWBT indicated that it would instruct Ms. Cavanaugh not to answer questions on her statements concerning her communications, should she be asked to testify.[48]

**Analysis**

Allowing evidence into the record while SWBT is claiming a privilege exists on the evidence, would be a violation of TEX. R. CIV. PROC. 193.4(c), which states "A party may not use -- at any hearing or trial -- material or information withheld from discovery under a claim of privilege, including a claim sustained by the court, without timely amending or supplementing the party's responses to that discovery." The plain language of TEX. R. CIV. PROC. 193.4(c) clearly anticipates that SWBT's request to use allegedly privileged information to exculpate, or explain the facts surrounding ACI Exhibit 153, without divulging the information to Petitioners, is not allowed. SWBT's attempt to develop the factual record surrounding ACI Exhibit 153 with selective information that it claims is privileged, without allowing the examination of closely related evidence that may exist, would mean that the veracity and completeness of SWBT's proposed rebuttal evidence could not be challenged. Moreover, the Arbitrators would not know if there were other communications concerning ACI Exhibit 153, or the type of directive contained in that e-mail, that are *not* exculpatory. Such a proposal contradicts the underlying purpose of TEX. R. CIV. EVID. 107.

Thus, the Arbitrators conditionally admitted the Cavanaugh affidavit, ruling that the statements regarding any communications other than ACI Exhibit 153, which SWBT claimed to be privileged, be stricken and fully redacted by SWBT. SWBT subsequently made its offer of

[46] *See* Confidential Attachment C, Paragraph 9.

[47] The affidavit was marked as SWBT Exhibit 43.

[48] Tr. at 277-280 (June 23, 1999).

proof and resubmitted the affidavit on July 1, 1999, with the stricken portions only lined-through. SWBT declined to fully redact the affidavit as ordered, claiming Ms. Cavanaugh could swear to the lined-out affidavit, but not to the fully-redacted form the Arbitrators ordered. Order No. 19 was then issued, requiring SWBT to comply with the redaction ruling if it wanted the affidavit admitted. SWBT declined to follow the ruling, and the affidavit was not admitted. In light of SWBT's position on intending to use allegedly privileged information without waiving same, Ms. Cavanaugh was not asked to testify by the Arbitrators.

**Conclusion**

For the reasons stated, the Arbitrators deny SWBT's request to use an allegedly privileged document in an effort to provide further explanation of ACI Exhibit 153. The Arbitrators that such document cannot be used without allowing the whole or the same subject to be inquired into, or any other evidence which is necessary to make ACI Exhibit 153 fully understood, or to explain it to be admitted into evidence.

## D. Petitioners' Motions for Sanctions

### *ACI and Covad Allegations; SWBT Defense*

In ACI's original motion for sanctions and its amended motion for sanctions, ACI alleges four separate grounds for sanctions. First, ACI claims SWBT's response was either non-responsive or its response was incomplete to specific RFIs. Second, ACI alleges SWBT intentionally materially revised ACI Exhibit 17, which was supposed to be a redacted version of ACI Exhibit 17a. Third, ACI argues that SWBT abused the "Confidential" designation by improperly designating numerous documents as confidential without any foundation for doing so. Finally, ACI claims that ACI Exhibit 153 instructed SWBT employees to intentionally take the actions described in Confidential Attachment C, Paragraph 10. In addition to the same four grounds for sanctions alleged by ACI, Covad alleges that SWBT intentionally misdesignated its experts in an effort to "plausibly deny" any knowledge of specific xDSL wholesale and retail implementation details.

ACI argues that as a direct result of the discovery misconduct committed by SWBT, it has expended a tremendous amount of resources in an effort to complete the extended discovery, conduct numerous new depositions, review the newly produced documents, and reformulate its case. As a sanction for SWBT's discovery abuses, ACI requests that the Arbitrators: (1) strike all of SWBT's direct and rebuttal testimony, and responses given on cross-examination concerning Decision Point List Nos. 1 through 22 and 27 through 32;[49] (2) adopt ACI's proposed contract language concerning these same DPL items as part of the interconnection agreement contract language; (3) declassify the documents contained in ACI and Covad's Motions to Declassify; and (4) reimburse all reasonable expenses, including attorney's fees, consultant's fees, and the additional travel and other expenses incurred by the continuance of this hearing.

Covad argues that the appropriate sanction for SWBT's conduct is to strike SWBT's answer to Covad's petition, find SWBT's defenses to Covad's positions to lack merit, and order SWBT to enter into an interconnection agreement containing the terms advanced by Covad in the underlying proceeding. Covad also requests that it be reimbursed for all costs, expenses and attorneys' fees incurred as result of SWBT's misconduct in this proceeding.

SWBT responds that the Petitioners have not met their burden to show sanctions are appropriate, and the Petitioners failed to show prejudice as a result of SWBT's conduct. SWBT contends that there has been no showing of a factual, legal, or public policy basis for any sanctions beyond the suspension of the hearing and the additional discovery ordered by the Arbitrators. SWBT further contends that subsequent production of documents after April 14, 1999, cured any harms that Petitioners may have suffered. SWBT also argues that relief sought by Petitioners is excessive and inappropriate under the legal standard set out in *TransAmerican Natural Gas Corp. v. Powell,* [50] particularly in light of SWBT's good faith effort throughout the discovery process. SWBT contends that the delay that may be experienced by the Petitioners into the Texas xDSL market is not associated with the failure to produce ACI Exhibit 17a. In closing arguments, SWBT argued that the interim agreements allowed ACI and Covad to enter

[49] The Decision Point List is attached to this order as Attachment A.

[50] 811 S.W.2d 913, 917 - 918 (Tex. 1991).

the DSL market in a timely fashion, which had the effect of curing any harm resulting from the delay of the hearing on the merits.[51]

The Arbitrators' rationale for their ruling on the five allegations is discussed separately below.

### *Violation Of The Protective Order*

#### Factual Summary

The first ground for Petitioners' motions concerns SWBT's alleged overbroad designation of confidential documents in violation of the Protective Order. ACI contends that SWBT violated the Protective Order by designating huge quantities of documents as "Confidential" in an effort to thwart open discussion of the issues. ACI argues that there is a presumption of openness and that SWBT must justify its excessive confidential designation. ACI provides examples of documents stamped "Confidential" that are public documents or have been sent to other telecommunications carriers.[52] ACI claims it is abusive to force parties to expend resources seeking to declassify documents, as well as a waste of the Commission's resources to review and make such determinations as to the confidential designation. ACI argues that SWBT was overly broad in applying the protective order to documents in spite of the Arbitrators' admonitions to limit the confidential designation to certain categories of documents.[53]

ACI also claims that SWBT abused its claim of privilege because SWBT provided no basis for its assertions of privilege in its privilege log. ACI argues that SWBT's privilege log does not provide adequate information to ascertain whether SWBT's claims are proper or

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[51] Order No. 5 clearly states ". . . the Arbitrators hereby clarify that the terms of this interim Order are not intended to be a grant of relief in response to the sanctions motions." Order No. 5, at 2. It should also be noted that SWBT appealed Order No. 5 to the Commission, then withdrew their appeal after reaching agreement with the Petitioners on interim interconnection terms.

[52] Brief of ACI on Sanctions Issues at 22.

[53] Order No. 9 delineates that documents related to the *physical implementation of xDSL* should not be designated "Confidential." (emphasis added) Order on ACI's and 's Discovery Dispute Related to Proprietary Documents and Claim of Privilege and 's Motion to Compel (May 20, 1999).

appropriate, and that ACI should not have to request an *in camera* review of the over 800 documents contained in the log to make this determination.

SWBT argues that the "Confidential" designation was properly made and that it followed accepted steps in designating documents as exempt from public disclosure. SWBT contends that Petitioners' concerns about improper designation are inappropriate for sanctions.

**Analysis**

The Arbitrators defined which documents were to be treated as confidential in the Protective Order in both dockets.[54] The purpose behind the Protective Order is to protect from public disclosure a narrow category of information, while still making such information available for use in the proceeding.[55] According to the Protective Order, the party designating material as confidential must clearly identify each portion of the material alleged to be confidential information, and provide a written explanation of the claimed exemption. Such explanation may be accompanied by affidavits providing appropriate factual support for any claimed exemption. The claim must also state the reasons why the material is not subject to the Open Records Act. Further, there is a rebuttable presumption that all information is non-confidential and the burden of establishing confidentiality is on the party proposing confidential treatment. All parties are bound by the protective order, which provides that documents designated as confidential cannot be disclosed for any purpose other than use during the proceeding. If used during the proceeding, the transcripts are marked confidential and that portion of the record is sealed.

The designation of any information as confidential information may be challenged to the Arbitrators, the Commission, or a court having competent jurisdiction for a determination, after hearing, as to whether said material should be so classified. Finally, the party asserting confidentiality bears the burden of proving that the alleged confidential information should be admitted under seal.

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[54] Order No. 2, Memorializing Prehearing Conference, Establishing Procedural Schedule and Issuing Protective Order (January 19, 1999).

[55] In contrast, documents for which a party claims a privilege from production, and therefore from availability for use in a proceeding, are governed by the procedures in P.U.C. PROC. R. 22.144 (d)-(g), and TEX. R. CIV. PROC. 193.2 and 193.3.

As stated in Order No. 19, the proceedings before this Commission are open and held in the public interest. Primarily for that reason, the presumption, as clearly stated in the Protective Order, is that all documents in this proceeding are public and not entitled to be veiled in secrecy. However, it must be noted that the Petitioners had full disclosure of the documents at issue. SWBT produced the majority of documents without redaction and the Petitioners had the opportunity to use the documents in the preparation of their cases. Further, the documents were not withheld from production under a claim of privilege.[56] Petitioners contend that SWBT's overbroad designation is an abuse of the protective order and is meant to thwart open discussion of issues in this proceeding.

**Conclusion**

The Arbitrators are still in the process of reviewing the documents at issue on a page-by-page basis to determine whether SWBT has met its burden in proving that those documents should be designated as "Confidential" and whether those documents should be declassified. Based on the specific examples provided by the Petitioners, the Arbitrators have concerns that SWBT's frequent use of "Confidential Information" may tend to robe these proceedings in a veil of secrecy.[57] Claims of confidential information must be made judiciously and carefully to avoid any appearance that these proceedings are not public proceedings. Although the examples of unsupported claims for protection appear to represent a violation of the Protective Order, the Arbitrators nevertheless believe the declassification of those documents that are found to not have been properly designated will resolve the issues in dispute, and that such violation is not a proper ground for discovery sanctions under TEX. R. CIV. PROC. 215.

***Improper Designation Of Witnesses***

**Factual Summary**

The second ground for sanction is Covad's allegation that SWBT intentionally misdesignated witnesses so that they could "plausibly deny" knowledge of key technical

[56] Other than ACI Exhibit 153.

[57] Brief of ACI on Sanctions Issues at 22.

information.[58] Covad argues that SWBT deliberately designated, in response to Covad's RFIs, certain SWBT employees as expert witnesses who were unable to answer specific questions in their claimed areas of expertise. Covad contends this is an improper defensive strategy utilized by SWBT, allowing SWBT to "plausibly deny" knowledge of critical technical issues on xDSL implementation. Because the designation was made in response to an RFI, Covad claims it is sanctionable conduct, because SWBT's designation of most knowledgeable persons was misleading.

SWBT did not respond to Covad's allegation of intentionally designating witnesses who were unable to answer questions on specific areas of SWBT's xDSL retail implementation.

**Analysis**

The scope of the relevant information missing from the RFI responses was not evident until SWBT produced ACI Exhibit 17. Thus, Petitioners were without critical information responsive to numerous RFIs until after the hearing commenced.

The discovery process that took place after April 14, 1999 was Petitioners' first opportunity to question SWBT's SMEs concerning spectrum management in the field. Additionally, this was the opportunity for ACI and Covad to depose a number of DSL core team members. ACI and Covad deposed approximately 20 additional witnesses in a matter of several weeks.

SWBT offers no defense to the allegations that SWBT failed to initially designate witnesses properly.[59]

**Conclusion**

The Arbitrators conclude that the designation of witnesses by SWBT in this proceeding was improper. If SWBT chooses to use witnesses for technical and factual matters who do not

[58] ACI counsel put forward a similar allegation at the hearing on the merits. Tr. at 792-797 (June 2, 1999).

[59] On page 22 of its Brief for Motion on Sanctions, SWBT stated that "... the volume and complexity of the RFIs, together with the short turnaround time, caused those participating in the process to not thoroughly canvas all relevant employees in preparing their answers to certain RFIs." The timeline to which they refer applied after April 14, 1999.

have personal knowledge of the facts, but instead are policy witnesses, then SWBT must ensure that such witnesses somehow are given access to the relevant information in a proceeding. Clearly, under the record, SWBT had access to numerous employees with direct knowledge of the central facts at issue in this proceeding, but chose not to designate such individuals as witnesses. Instead, SWBT chose to designate witnesses who did not have knowledge of the core critical issues in this case and who could therefore not answer questions on these issues. The end result was that SWBT's witnesses presented an inaccurate and incomplete picture of the facts, which is misleading at best, and does not allow Petitioners to ascertain the truth nor adequately prepare for the arbitration. The discovery process and designation of SMEs is not new to SWBT, and the company should have proper procedures in place to efficiently and effectively designate witnesses and ensure they are aware of the company's activities. Failure to completely answer discovery is treated the same as not answering at all.[60] SWBT's failure to provide fully responsive SMEs in response to Petitioners' RFIs and in the presentation of its case is an abuse of discovery.

### *Failure To Produce Documents*

#### Factual Summary

Next, the Arbitrators address the central ground for sanctions, SWBT's uncontroverted failure to produce documents prior to April 14, 1999. ACI asserts that it suffered harm because of SWBT's failure to produce key documents on issues that go to the heart of the interconnection dispute. Specifically, ACI points to ACI Exhibits 17 and 17a, which are the DSL Methods and Procedures that SWBT uses in its retail xDSL offerings. ACI requested in RFI 2-36 all documents containing methods and procedures for how SBC will monitor, track and administer for itself various xDSL offerings. However, ACI claims that SWBT produced no documents in response to this RFI. ACI asserts that ACI Exhibits 17 and 17a would have been responsive to RFI No. 2-36, as well as RFI Nos. 2-1, 2-2, 2-3, 2-11, 2-15, 2-19, 2-31, 2-63, and 3-16.[61]

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[60] TEX R. CIV. PROC. 215 (1)(c).

[61] Brief of ACI on Sanctions Issues at 12, 13.

ACI claims it was apparent from testimony during the hearing on the merits on April 14, 1999, that documents requested by ACI existed at the time of the RFI, yet were not produced by SWBT. ACI asserts there was a substantial number of RFIs that SWBT either did not respond to, responded to incompletely, or responded to with false or misleading information. Although SWBT eventually produced responsive documents in accordance with the Arbitrators' order,[62] ACI argues that SWBT should still be sanctioned for its misconduct because of the harm it caused Petitioners.

Covad claims that SWBT failed to produce all responsive documents to Covad's RFIs until after the Arbitrators ordered further discovery after April 14, 1999. In particular, Covad asserts that SWBT failed to produce responsive documents to Covad's RFI Nos. 1-9, 1-11, 1-27, 2-1, 2-3, 2-42, 2-41, 2-48, 2-49, 2-52, 2-54, 3-17, 6-1, and 6-2 until after the hearing convened on April 14, 1999. [63] Covad claims that during the second round of discovery, SWBT produced for the first time hundreds of documents that it should have produced in response to Covad and ACI's pre-April 14 RFIs, many of which go directly to critical issues in this proceeding.

SWBT admits that it failed to produce documents in response to Petitioners RFIs; however, it contends that it was an oversight and unintended. Further, SWBT replies that it has complied with subsequent discovery requests, including those directed by the Arbitrators, since April 14, 1999. SWBT also asserts that after the April 14, 1999, hearing, the Arbitrators reduced the response time to RFIs to five days, creating a tremendously burdensome timeline for SWBT to comply, given the volume of the documents produced. SWBT also notes that it has taken internal steps to prevent this problem from occurring again.[64]

**Analysis**

The information contained in ACI Exhibits 17 and 17a are central to the parity issues in the interconnection dispute. Prior to April 14, 1999, SWBT produced few or no documents in response to several RFIs concerning loop conditioning, SWBT retail/wholesale xDSL offerings,

[62] Tr. at 642 (April 15, 1999).

[63] Covad's Brief in Support of Motion and Amended Motion for Sanctions, Exhibit A.. claims that Attachment A contains a small selection of critical documents SWBT did not produce until after April 14, 1999 .

[64] SWBT Brief on Motions for Sanctions at 22-23; Tr. at 82 (June 2, 1999).

and xDSL ordering and implementation issues. Only after the Arbitrators ordered the parties to undergo further discovery as a result of the discovery of ACI Exhibits 17 and Exhibit 17a, did ACI receive more responsive documents on these issues. The record clearly shows, and SWBT admits, that they did not produce documents in response to discovery requests for documents and information prior to April 14, 1999.

Whether discovery abuse occurred is not in question.[65] Petitioners' request for sanctions is timely and conforms to the requirements of TEX. R. CIV. PROC. 215. SWBT bears the burden of proof to show that either the misconduct did not occur, or that good cause existed for the misconduct. SWBT, having admitted to the misconduct, claims it was not intentional. TEX. R. CIV. PROC. 215 does not require a finding of intent for a party to be sanctioned for discovery abuse.

Failure to timely and completely answer requests for information, produce documents, supplement answers, appear at depositions or produce documents in response to a *subpoena duces tecum* at a deposition, or otherwise abuse the discovery process is considered sanctionable conduct under TEX. R. CIV. PROC. 215. Answering a discovery request for documents incompletely is considered to be a failure to answer,[66] including a claim that a similar document or documents containing the same information was produced. *City of Dallas v. Ormsby,* 904 S.W.2d 707, 710 - 711 (Tex.App.—Amarillo 1995) writ denied. Further, the failure to supplement discovery requests in a timely manner has been held to be an abuse of discovery. *Foster v. Cunningham,* 825 S.W.2d 806, 808 - 809 (Tex.App.--Fort Worth 1992) writ denied. (Where party had convenient opportunity to share requested information, but did not do so, withholding information was sanctionable conduct). It is undisputed by SWBT that it failed to produce all responsive documents prior to the initial day of the hearing on the merits.[67] Given

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[65] The parties concur and the record reflects that SWBT did not produce any M&P documents, as requested, stating that there were none to be produced.

[66] TEX. R. CIV. PROC. 215(1)(c).

[67] Tr. at 620-621 (April 15, 1999). Mr. Leahy states: "Based upon our review of the RFIs and our questions last night to other employees of Southwestern Bell Telephone Company, it's our position this should have been turned over prior to this afternoon. So it is responsive to a particular RFI, and I think it's labeled on the cover, and so that is our position, and it's regretful that we did not have this document sooner. You know, when we get these requests, we ask the Company at large, but then we try to figure out who would likely have this document, and it was missed."

these facts, to avoid sanctions for its discovery misconduct, SWBT must show good cause for its failure to produce.

**Good Cause Exception**

To avoid sanctions, SWBT must make a showing of good cause. TEX. R. CIV. PROC. 215. *Remington Arms Co. v Canales,* 837 S.W.2d 624, 625 (Tex. 1992). Generally, excuses that the party was unaware of the existence of responsive documents, or that an employee/agent failed to follow instructions of the attorney or client, which resulted in incomplete production of documents has not been held to be a sufficient showing of good cause. *Garcia Distr., Inc. v. Fedders Air Conditioning, USA, Inc.,* 773 S.W.2d 802, 805 - 806 (Tex.App.—San Antonio 1989) writ denied.

The good cause exception is limited to situations where one could not in good faith and by due diligence immediately respond, or where difficult or impossible circumstances prevented one from supplementing discovery. *Foster* at 807. SWBT has not claimed in any way difficult or impossible circumstances that prevented it from complying with Petitioners' pre-April discovery requests. Moreover, SWBT's claim that Petitioners were not harmed and that subsequent production "cured" their misconduct is not good cause for its failure to produce documents in the first place. To relax the good cause standard would impair its purpose. *See Alvarado v. Farah Mfg. Co.,* 830 S.W.2d 911, 915 (Tex. 1992).

SWBT's only apparent defense is that it made a honest mistake and that its failure to timely produce what became ACI Exhibit 17 (and 17a) and other forthcoming documents was an administrative oversight.[68] Prior to April 14, 1999, SWBT claims that it had no knowledge of the existence of such information. However, through testimony developed after April 14, 1999, it became clear that those who were responsive to the RFIs in question were aware of "core teams" for within SWBT.[69] These core teams produced documents that would have been responsive to the ACI's and Covad RFI's on methods and procedures. Despite the knowledge of

[68] Tr. at 620-621 (April 15, 1999); Tr. at 82 (June 2, 1999).

[69] Tr. at 1117 (June 3, 1999).